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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944 45

No. 1165 59

THE UNITED STATES OF AMERICA, APPELLANT

vs.

HENRY BOMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

FILED APRIL 18, 1945

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1159

THE UNITED STATES OF AMERICA, APPELLANT

vs.

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

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1 [Caption omitted.]

2 In United States District Court, Western District of Texas

Civil Action Docket No. 621

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CON TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED

vs.

UNITED STATES OF AMERICA

Basis of Action—Suit to recover the sum of $6,937.76, Federal Estate Tax, paid to Frank Scofield, Collector of Internal Revenue by pltf. and alleged to have been illegally collected, and for interest and costs of suit.

Date	Filings—Proceedings	Pltf.	Dept.
Nov. 10, 1944—	1. Petition filed in duplicate	$15.00	------
Nov. 11, 1944—	Issued Summons, Copies and Copies of complaint for service	------	------
Nov. 13, 1944—	2. Summons filed Ex. 11-11-44, by Bain, Deputy Marshal	------	------
Dec. 1, 1944—	3. Answer filed in duplicate	------	------
Feb. 12, 1945—	4. Stipulation filed—oral arguments heard	------	------
Mar. 2, 1945—	5. Opinion of the Court filed	------	------
Mar. 7, 1945—	6. Judgment for Plaintiff in the sum of $6,937.76 with interest at 4% from date	------	------
Mar. 9, 1945—	7. Motion to Amend Findings of Fact and Conclusions and to Correct amount of Judgment, filed	------	------
Mar. 13, 1945—	8. Order denying Defendant's Motion to Amend Findings and Conclusions and Correcting amount of Judgment	------	------
Mar. 30, 1945—	9. Petition for appeal to Supreme Court U. S., filed	------	------
Mar. 30, 1945—	10. Statement as to Jurisdiction, filed	------	$5.00
Mar. 30, 1945—	11. Assignment of Errors, filed	------	------
Mar. 31, 1945—	12. Order Allowing Appeal, entd	------	------
Mar. 31, 1945—	13. Statement, filed	------	------

Date	Filings—Proceedings	Pltf.	Dept.
Mar. 31, 1945—14.	Service of Instruments Required by Rule 12, Paragraph 2, of Revised Rules of the Supreme Court, filed	------	------
Mar. 31, 1945—15.	Praecipe for Transcript of Record, filed	------	------

3 In United States District Court, for the Western District of Texas, San Antonio Division

Civil Action No. 621

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CON TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED

vs.

UNITED STATES OF AMERICA

Complaint

Filed Nov. 10, 1944

To the Honorable WALTER A. KEELING, United States District Judge:

Henry Rompel, Jr., Administrator de bonis non with the will annexed, of the Estate of Ernst Herbst, Deceased, hereinafter styled plaintiff, complaining of the United States of America, hereinafter styled defendant, respectfully alleges:

I

The plaintiff is a citizen of the United States and of the State of Texas, and resides in New Braunfels, Comal County, Texas, which is in the San Antonio Division of this Court. The decedent was also a citizen of Texas, and a resident of said City, County, and State at the time of his death, and his Estate is being administered in Comal County, where the decedent's will was probated by the County Court of Comal County, and plaintiff is authorized to bring this suit and to take all other actions taken by him in connection therewith.

This plaintiff was duly appointed by said Court as Successor to Natalie Herbst, Executrix of said Estate, who died before the administration of the Estate was completed, the said Natalie Herbst having been named as Independent Executrix in the will

and Paul Sultenfuss, who was named therein as Successor Executor, having also died prior to the appointment of this plaintiff as Administrator. Said administration is still pending with the plaintiff as Administrator.

II

This suit involves a claim against the United States of America for less than Ten Thousand Dollars ($10,000) including principal and interest, and the cause of action arises under the Revenue Laws of the United States, and this suit is one over which the District Courts of the United States are given original jurisdiction under Subdivision 5 and Subdivision 20 of Section 41 of Title 28, U. S. C. A., being a suit involving claim for refund of revenue taxes.

III

On or about the 5th day of July 1944, the plaintiff paid to Frank Scofield, Collector of Internal Revenue for the First Collection District of Texas, at Austin, Texas, the sum of Six Thousand Nine Hundred Thirty-Seven and 76/100 Dollars ($6,937.76), being the full amount of Federal Estate Tax claimed by the United States of America after crediting on the amount of that tax the full amount of the basic Federal Estate Tax which was due to and paid to the State of Texas. Said payment to said Collector was made under protest and solely to avoid the imposition of penalties and interest which would otherwise have been asserted, claimed, and collected by the United States of America. The plaintiff contemporaneously protested the payment of said tax, and subsequently on or about July 14, 1944, duly filed with the said Collector of Internal Revenue of the United States a Claim for Refund based upon the facts and claims herein set forth. This Claim for Refund was duly presented to the Commissioner of Internal Revenue of the United States, who rejected said Claim on the 31st day of October 1944.

IV

Plaintiff alleges that the amount paid by him was claimed by the United States Government on the basis of reports prepared by its Internal Revenue Agents, the originals of which are not in the possession of the plaintiff and production thereof is demanded of the defendant.

V

Plaintiff alleges that the facts set forth in the Claim for Refund filed by him are true, and are as follows:

Ernst Herbst, husband of Natalie Herbst, died at New Braunfels, Texas, on November 17, 1943, leaving her and their child and grandchildren surviving. An estate tax return was filed in due course with respect to his estate by Henry Rompel, Jr., Administrator de bonis non with the will annexed, who is duly qualified and is now acting as such Administrator. As reported, the gross estate amounted to $58,177.51 and the deductions claimed therefrom to $5,233.45. Said return disclosed no estate tax liability. The gross estate, as returned, consisted of an undivided one-half of the property owned in community by the decedent and his surviving wife at the date of the decedent's death, none of which had been received as compensation for personal services actually rendered by either spouse or derived originally from such compensation or from separate property of either spouse. The only separate property of either spouse was one item of real estate which was the separate property of the decedent of an agreed value of $12,831.20. All of said property was located in Texas.

6 The decedent and wife were married at Bulverde, Texas, on February 12, 1901. They continued to reside together in Texas until the decedent's death. Decedent by his will, which was duly probated, undertook to devise only his one-half of the community property to the beneficiaries named therein.

This estate tax return was investigated in due course by Internal Revenue Agent, J. N. Keith, attached to the office of the Internal Revenue Agent in Charge at Dallas, Texas. Upon such investigation, it was held that there should be included in the gross estate of the decedent in addition to his separate property aforesaid, all of the property held in community by the decedent and his surviving wife at the date of the death of the decedent. It was also held by said Revenue Agent that there should be included in the decedent's gross estate $2,500 representing the proceeds of three certain policies of life insurance upon the life of the decedent, of which policies decedent's surviving wife was the sole beneficiary. All of these policies had been acquired during the marriage between decedent and his surviving wife, and all premiums paid thereon had been paid from community funds, and, immediately prior to the death of the decedent, all of the rights of ownership, equities, and values attaching to said policies belonged to the aforesaid community estate, and had so belonged since the several policies were acquired. Said agent also adjusted the values at which various items of property had been returned in the aforesaid tax return. These adjustments as to

value have been agreed to by the administrator, and are not in question here.

7 Because of the aforesaid, the agent determined that the decedent's gross estate amounted to $115,615.19, the deductions therefrom $5,541.83, and the estate tax liability, after giving full credit for State Inheritance Tax, to $6,937.76.

All of the estate tax so paid to the aforesaid Collector is attributable solely to the fact that the agents of the Bureau of Internal Revenue included as a part of the decedent's gross estate, for the purpose of determining the estate tax due under Chapter 3 of the Internal Revenue Code, all of the property which at the date of decedent's death belonged to him and his wife in community, and all of the proceeds of life insurance upon the life of the decedent, and did not include therein only that one-half of the property so held in community which was owned by the decedent at the date of his death, and did not include only one-half of the proceeds of the life insurance upon the life of the decedent. The surviving wife's share (one-half) of said community property was so included in decedent's gross estate because, and only because, of the provisions of Section 402 (b) of the Revenue Act of 1942, amending Section 811 (e) of the Internal Revenue Code, and all, rather than one-half, of said insurance was so included in decedent's gross estate because, and only because, of the provisions of Section 404 (a) of the Revenue Act of 1942, amending Section 811 (g) of the Internal Revenue Code.

VI

Plaintiff says that the aforesaid tax so paid, with interest thereon as provided by law, should be refunded to plaintiff

8 because said Section 402 (b) and said Section 404 (a) of the Revenue Act of 1942, and each of said sections, are invalid and unconstitutional, and the said tax so collected by reason thereof is an invalid and unconstitutional tax.

The terms, purpose, and effect of said Section 402 (b) and Section 404 (a) of the Revenue Act of 1942, respectively, are:

To impose an estate tax measured in part by property which did not belong to the estate of the decedent; which had never belonged to the decedent and which did not pass by reason of the death of the decedent, and as to which, neither the decedent's death nor any prior act of decedent, increased the rights, title, ownership, or control of the actual owner (the surviving spouse) of the property so used to measure the tax.

To impose an estate tax (such a tax being an excise), which is not uniform throughout the United States, but which is by its express terms limited in scope and application to limited areas

of the United States, to wit, those States having the community marital property system.

To impose a direct tax which is not a tax on income and which is not apportioned among the several states of the United States in accordance with their population or upon the basis of a census or enumeration taken as provided in the Constitution of the United States.

To regulate, change, or control the marital property system in force in Texas (the State of decedent's residence) and other states having the community marital property system and thus to exercise powers not vested in the Government of the United
9 States but reserved to the several states of the United States and the people thereof.

To impose a wholly arbitrary, capricious, and confiscatory tax retroactive in its operative effect and to create wholly arbitrary and capricious presumptions of law and fact.

To impose (so far as life insurance is concerned) a tax on that portion of the proceeds of life insurance which is not payable to or for the benefit of the decedent's estate and where as to said one-half the insured neither paid the premiums on the policies nor possessed any legal incidents of ownership therein.

For these, and other reasons, said Section 402 (b) of the Revenue Act of 1942, and Section 811 (e) of the Internal Revenue Code, as amended thereby, and Section 404 (a) of the Revenue Act of 1942, and Section 811 (g) of the Internal Revenue Code, as amended thereby, and the imposition and collection of the tax violate the following and other provisions of the Constitution of the United States and the amendment thereto:

(1) Art. 1, Sec. II, 3rd Clause, of the Constitution of the United States, providing that direct taxes shall be apportioned among the several States in accordance with their population.

(2) Art 1, Sec. VIII, 1st clause of the Constitution of the United States, providing that all duties, imposts, and excises shall be uniform throughout the United States.

(3) Art 1, Sec. IX, 4th Clause, providing that no direct tax shall be laid unless in proportion to a census or enumeration taken, as provided in said Constitution.

10 (4) That portion of the Fifth Amendment to the Constitution of the United States which provides that no person shall be deprived of property without due process of law and that private property shall not be taken for public use without just compensation.

(5) The Tenth Amendment to the Constitution of the United States, providing that all powers not granted to the United States by the said Constitution, and its Amendments, are reserved to the several States and the people thereof.

In addition, plaintiff asserts that said Section 402 (b) of the Revenue Act of 1942, and Section 811 (e) of the Internal Revenue Code, as amended thereby, and Section 404 (a) of the Revenue Act of 1942, and Section 811 (g) of the Internal Revenue Code, as amended thereby, and all Regulations of the Bureau of Internal Revenue pursuant thereto, violate the Constitution of the United States and amendments thereof, and are void and invalid, and the estate tax imposed thereunder is unconstitutional and invalid and said tax should be refunded.

VII

Plaintiff further says that because of the facts herein set forth no liability for Federal Estate Tax exists against said Estate either under Section 810 of the Internal Revenue Code, or Section 935 of the Internal Revenue Code, or otherwise.

VIII

The only persons interested in the Claim on which this suit is based are the beneficiaries of the Estate of the decedent, Ernst Herbst, under voluntary bequests made to them by his will,
11 and no assignment or transfer of said Claim, or any part thereof or interest therein has been made, and plaintiff in his capacity as Administrator is justly entitled to recover the amount herein claimed from the United States after allowing all just credits and offsets, and this plaintiff and the said Ernst Herbst and the beneficiaries of his Estate are all citizens of the United States, and have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; and the facts as stated in this petition are true to the best of the knowledge and belief of this plaintiff and of the beneficiaries of the Estate.

Wherefore, premises considered, plaintiff prays that service be had upon the defendant as provided by the statutes and the Rules of the Court by serving a copy of the summons and complaint herein on R. W. Smith, Jr., the United States Attorney for the Western District of Texas, at his office in San Antonio, Texas, and by sending by registered mail copies thereof to the Attorney General of the United States and to the Commissioner of Internal Revenue, at Washington, District of Columbia; and that upon hearing this plaintiff have and recover judgment against defendant for the amount of the tax paid in the sum of Six Thousand Nine Hundred Thirty-Seven and 76/100 Dollars ($6,937.76), to-

gether with interest and for costs of Court and for all other proper relief and remedies.

HARRY C. WEEKS,
Forth Worth, Texas,
J. PAUL JACKSON,
Dallas, Texas,
PALMER HUTCHESON,
Houston, Texas,
R. N. GRESHAM,
San Antonio, Texas,
Attorneys for Plaintiff.

12 [*Duly sworn to by R. N. Gresham; jurat omitted in printing.*]

[File endorsement omitted.]

13 In United States District Court

[Title omitted.]

Answer

Filed Dec. 1, 1944

Comes now defendant by its attorney, William Robert Smith, Jr., United States Attorney for the Western District of Texas, and in answer to plaintiff's complaint admits, denies, and alleges as follows:

I

Admits the allegations contained in paragraph I of plaintiff's complaint.

II

Admits the allegations contained in paragraph II of plaintiff's complaint.

III

Admits the allegations contained in paragraph III of plaintiff's complaint.

IV

Answering paragraph IV of plaintiff's complaint, defendant avers that the papers and matters therein alleged are incompetent and immaterial.

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V

Admits the allegations contained in paragraph V of plaintiff's complaint, except avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that no part of the community property shown on the federal estate tax return had been received by decedent as compensation for personal services actually rendered by him, or derived originally from such compensation or from separate property of decedent.

VI

Denies all the allegations contained in paragraph VI of plaintiff's complaint.

VII

Denies all the allegations contained in paragraph VII of plaintiff's complaint.

VIII

Admits the allegations contained in paragraph VIII of plaintiff's complaint, not hereinabove denied, except denies that plaintiff is entitled to recover.

Wherefore, having fully answered defendant prays judgment dismissing plaintiff's complaint and for costs.

W. R. SMITH, JR.,
United States Attorney.

[File endorsement omitted.]

15 In United States District Court

[Title omitted.]

Stipulation as to certain facts

Filed Feb. 12, 1945

The parties to the above-entitled and numbered cause, acting by and through their duly authorized attorneys of record, hereby agree and stipulate that upon the trial of this cause, and in all subsequent proceedings in said cause, the facts hereinafter stated (in addition to the facts alleged in the complaint filed herein by the plaintiff and admitted in the answer herein filed by the defendant) shall be taken as true, and as if established by competent evidence introduced and received at the trial of said cause. It is stipulated that this cause shall be submitted on this agreed statement of facts and the pleadings.

I

The following summary accurately discloses the method employed by the taxing officers of the defendant in determining decedent's taxable estate (because of the small amount of taxes involved in the insurance issue, plaintiff waives any claim relative thereto):

Separate property of decedent

1. An undivided 1/7th interest in approximately 9,331.85 acres of ranch land in Kinney County, Texas—Valued at	$12,831.20

Community property of decedent and surviving wife

2. Approximately 2,769.09 acres of ranch land in Comal County, Texas—Valued at	30,657.06
3. Lot in New Braunfels, Texas—Valued at	2,250.00
4. 2/3rds interest in Lot in New Braunfels, Texas—Valued at	1,000.00
5. Lot in San Antonio, Texas—Valued at	4,700.00
6. Lot in San Antonio, Texas—Valued at	1,700.00
7. Stocks and Bonds—Valued at	13,607.52
8. Mortgages, notes, and cash—Valued at	45,169.44
9. Proceeds of Life Insurance on decedent's life	2,500.00
10. Miscellaneous property—Valued at	1,200.00
Total gross estate	115,615.19

Deductions

Funeral Expenses	1,733.45
Executor's commissions	1,250.00
Attorneys' Fees	1,500.00
Miscellaneous administration expenses	975.00
Debts of decedent	83.38
Total deductions	5,541.83
Total estate tax liability before allowance of credit for State Inheritance Tax	7,018.34
Net estate tax after allowance of credit for State Inheritance tax	6,937.76

II

From the date of his marriage on February 12, 1901, until 1934, the decedent's principal business activity was that of raising livestock or ranching. This business was conducted on the ranch referred to as Item (2) in the schedule set forth in the preceding paragraph. Decedent and his wife lived on this property during the greater portion of their married life. This property was acquired largely on the credit of and paid for out of savings from the aforesaid ranching business. The residue was saved and invested from time to time. These savings, except to the extent that the rentals from decedent's separate property hereafter dealt with

contributed thereto, ultimately resulted in the acquisition and ownership of the property listed as community property in Paragraph I of this stipulation.

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III

On the 20th day of October 1937, the decedent inherited from his brother an undivided one-seventh (1/7) interest in approximately 9,331.85 acres of ranch land in Kinney County, Texas. This is the real estate referred to as Item (1) in the schedule set forth in Paragraph I of this stipulation. After he inherited this undivided interest in the aforesaid land, the decedent rented his interest therein at an annual rental of approximately Four Hundred ($400.00) Dollars. As he received these rentals they were deposited in the bank account in which he deposited receipts from all other sources, and from which all personal and family expenses were paid, as well as all business expenses and the cost of investments. The decedent did not segregate or maintain the identity of these rental receipts.

IV

In 1934, the decedent and his wife moved from the ranch, referred to in Paragraph II of this stipulation, to the town of New Braunfels, Texas, where they lived until the decedent's death. After this move, this ranch was rented to the decedent's son-in-law at an annual rental of approximately Nine Hundred ($900.00) Dollars per year. In addition to this rental, approximately Two Hundred ($200.00) Dollars per year was received for hunting leases upon this ranch. After moving to New Braunfels, the decedent confined his business activities to making loans and investments out of the aforesaid savings and receipts and to attending to the same. During their marriage, neither the decedent nor his wife was ever employed by anyone at a wage or a salary, and neither received, during that time, any commissions, fees, or similar compensation for personal services rendered to another. All of the community property described in Paragraph I of this stipulation represented accumulations and savings from the

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business of raising livestock and rentals, interest, and dividends on properties acquired with these savings, except to the extent that the rentals derived from the interest in the aforesaid ranch property in Kinney County, Texas, inherited by the decedent as above set forth, may have gone into these investments.

In witness whereof, this stipulation has been executed upon behalf of the parties to the above-entitled and numbered cause, by

their respective attorneys of record, this 9th day of January A. D. 1945.

HARRY C. WEEKS,
PAUL JACKSON,
RUPERT N. GRESHAM,
PALMER HUTCHESON,
Attorneys for Plaintiff.
W. R. SMITH, Jr.
U. S. Attorney,
J. M. BURNETT,
Ass't. U. S. Attorney,
Attorneys for Defendant.

[File Endorsement Omitted.]

19 In United States District Court for the Western District of Texas, San Antonio Division

Civil Action No. 621

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Judgment

Filed March 7, 1945

Be it remembered that on the 12th day of February 1945, this cause came on for trial and the Plaintiff announced ready through his attorneys, and the Defendant, United States of America, announced ready through the United States Attorney, and the parties in open Court announced that the case was submitted to the Court for decision upon the Stipulation of Facts filed therein and the allegations of Plaintiff's petition, as admitted in the Defendant's answer.

And it appearing to the Court that it has jurisdiction over the parties and the cause of action asserted by the Plaintiff, and that Plaintiff has fully complied with all requirements for the institution and maintenance of this suit in this Court and is entitled to recover the full amount of his claim, and the Court having filed herein an opinion of the Court dated March 2, 1945, setting forth the specific findings by the Court of the facts therein and the conclusions of the Court upon all questions of law involved in the case, and rendered judgment thereon;

It is now hereby ordered, adjudged, and decreed, that the Plaintiff, Henry Rompel, Jr., Administrator de bonis non cum
20 testamento annexo of Ernst Herbst, Deceased, do have and recover against the United States of America judgment for the sum of Six Thousand Nine Hundred Thirty-Seven and 76/100 Dollars ($6,937.76), together with interest thereon from March 2, 1945 at the rate of four per cent (4%) per annum.

To the action of the Court in entering this judgment, the United States Attorney duly excepted in behalf of Defendant.

ALLEN B. HANNAY,
United States District Judge.

[File endorsement omitted.]

21 In the District Court of the United States for the Western District of Texas, San Antonio Division

Civil Action No. 621

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNEST HERBST, DECEASED, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

R. N. Gresham, San Antonio, Texas; Palmer Hutcheson, Houston, Texas; J. P. Jackson, Dallas, Texas; and Harry C. Weeks, Fort Worth, Texas, for the Plaintiff.

Samuel O. Clark, Jr., Asst. Attorney General; Andrew D. Sharpe, Helen R. Carloss, and James P. Garland, Special Assistants to the Attorney General, and W. R. Smith, Jr., United States Attorney, for the Defendant.

Findings, conclusions, judgment, and opinion filed March 2, 1945

This suit was brought under the Tucker Act (Sections 761–5, Title 28 U. S. C. A.) to recover an estate tax assessed against and collected under protest from the plaintiff with respect to the estate of Ernest Herbst, a Texas citizen, who died November 17, 1943. This tax resulted from the defendant's inclusion in the decedent's gross estate of all of the community property which belonged to the decedent and his wife, and which had been accumulated by them in Texas, at the date of decedent's death, rather than one-half thereof. This, the parties admit, is required by the provisions of Section 402 (b) of the Revenue Act of 1942. Plaintiff timely filed claim for refund, which was rejected, and relies for recovery upon

his properly pleaded contention that this Section violates various provisions of the Constitution of the United States. The defendant asserts the Section is valid. If the Section is unconstitutional, the plaintiff is entitled to recover all of the tax paid, for the decedent's separate estate plus one-half of the community estate (less deductions not in controversy) amounts to less than the statutory exemption of Sixty Thousand Dollars ($60,000.00) prescribed by the 1942 Act (Section 935 (c) I. R. C. as amended). If the Section is not unconstitutional and void, plaintiff admits that he is entitled to recover nothing.

No evidence having been introduced, the Court finds as the facts the allegations of fact contained in the complaint, to the extent they were admitted by defendant's answer, and the additional facts contained in the written stipulation filed herein by the parties. These are incorporated here by reference.

The Court concludes:

1. Section 402 (b) of the Revenue Act of 1942 is unconstitutional and void, being in conflict with the requirements as to due process contained in the Fifth Amendment to the Constitution of the United States, as well as with the requirement of uniformity for an excise tax contained in Article 1, Section 8, Clause 1, of the said Constitution.

2. Plaintiff is entitled to recover from defendant the aforesaid sum of Six Thousand Nine Hundred Thirty-Seven and 76/100 Dollars ($6,937.76) heretofore collected from plaintiff, with interest from the date of judgment, as provided by law.

The constitutional questions presented by plaintiff must be decided, for there is no way to construe Section 402 (b) of the Revenue Act of 1942 so as to avoid necessity for such a decision. The responsibility thus imposed upon the Court is fully appreciated, and were it possible to decide the rights of the parties by a construction which would avoid the constitutional problems the Court would do so.

The factual situation presented by this record is a typical one—one which, with minor and unimportant variations, exists as to many husbands and wives in Texas. Herbst and wife had no property at the time of their marriage in 1901. Until 1937 neither acquired any property by gift, devise or descent. Neither ever received compensation for personal services rendered to anyone. He, a stock farmer, and his farmer wife, living together on a small ranch acquired after marriage largely on credit, gradually acquired a comparatively substantial estate which, as a matter of common knowledge, was attributable to the joint work of both the decedent and his wife. The separate property acquired by the decedent in 1937 and which was on hand intact at his death, did not contribute

materially to the accumulations, and need not enter into the consideration of the problem involved.

Before passing on the constitutional questions raised, it is necessary to examine the rights and title of the decedent and his surviving wife in the community property owned by them at the time of his death.

The community law of Texas stems from the civil law, and it has been the law of Texas as far back as any historical record exists. It was the law of the Spanish Empire when Texas was a part thereof. It was the law of the Republic of Mexico when Texas was part of Mexico. It was the law of the Republic of Texas when Texas was a Republic. And it was the law of Texas when Texas was admitted to the Union in 1845. Prior to, and as a condition of Texas becoming a part of the Union, Congress by joint resolution provided that Texas was to adopt a Constitution acceptable to the Congress, and pursuant thereto the Constitution of 1845 was adopted preserving therein the community property system as then recognized in Texas. It has remained the fundamental law of Texas, without the change of a single word in the Texas Constitution, from that date. It was important to note that this occurred many, many years before any Federal Estate Tax legislation was ever had. Thus Texas community property law is embedded in and forms a part of the State policy of Texas. Hopkins v. Bacon, 282 U. S. 122. And this State law establishes a rule of property which the Federal Court is bound to follow. Warburton v. White, 176 U. S. 484, *496*; Tyler v. United States, 281 U. S. 497, *501*. It is neither a contractual nor consensual system, but an ancient body of law forming an important and integral part of the fundamental law of Texas, and results, not from voluntary agreements of the parties, but by operation of law, as a vital incident of the marriage relation. Compare Commissioner v. Harmon, 323 U. S. —).

Under this community system, the wife is an equal owner with her husband in all of the community property. Their rights, title and interest are coequal and of equal dignity. The wife does not take her title through or under the husband. Her interest is an absolute, vested property right. The husband never owned any interest in her portion of the property, inasmuch as she acquired it by onerous title at the very moment of its acquisition and continued uninterruptedly to hold such title as long as the property remained an asset of the community. The husband owns no interest in the wife's portion of the property which terminates with his death. He cannot, and in the instant case he did not undertake to, dispose of her interest by will. On his death, his one-half interest in the property passed to his legatees and devisees. The wife simply

retained an equal interest in the property which she owned as coowner prior to her husband's death.

23 The wife enjoys full power of testamentary disposition of her one-half interest in the property, having the unqualified right to will it to whom she chooses. At her death without a will her interest passes to her heirs at law.

The relationship of the spouses in Texas during their lifetime is substantially that of partners in a commercial partnership, and the husband and wife are in all respects equal partners, the husband being the managing partner and vested with management powers. The husband, as managing partner, stands in a fiduciary relation to his wife, and must act in good faith in the handling of her interest in the property, and should he defraud or attempt to defraud his wife's interest, she may have redress against him or against her property in the hands of a third party. He must account to her strictly if his power of management is used to impair her community interest. Bad faith is not the criterion. He is the trustee, and is accountable as such. Arnold v. Leonard, 114 Texas 535, 273 S. W. 799.

In the case of divorce she has the right to her one-half, and if no property settlement is made on divorce the parties each continue to hold one-half thereof as tenants in common.

Should her husband, the managing partner, become insane, imprisoned, or otherwise incapacitated, or should he abandon her, she may succeed to the management of the community estate. At his death she, as surviving partner, is charged with winding up the affairs of the connubial partnership.

The wife is liable for income taxes on the property which represents her one-half interest of the partnership income. At her death her legatees and heirs are liable for Texas inheritance taxes on her one-half of the community property, just as the husband is on his half only. Jones v. State, 5 S. W. (2d) 973. At her death, her estate must pay federal estate taxes upon her one-half interest, even under the terms of the Act in question, just as she and her husband have been paying on their respective half interests only, with full approval prior to the 1942 Act. T. D. 2450 and 3670.

It is clear from the foregoing summary that in Texas the wife is a full equal co-owner with her husband of the community partnership assets. The Supreme Court of Texas has repeatedly so held. Wright v. Hayes, 10 Tex. 130; Burnham v. Hardy Oil Co., 108 Tex. 555; Patty v. Middleton, 82 Tex. 586; Wheat v. Owens, 15 Tex. 242; Wood v. Wheeler, 7 Tex. 13; Arnold v. Leonard, supra; Jones v. State, supra; Blackmon v. Hansen, 169 S. W. (2d) 962. The Supreme Court of the United States has likewise repeatedly recognized that the rights of the two spouses are equal,

under community property law. Warburton v. White, 176 U. S. 484; Arnett v. Reade, 220 U. S. 311; Poe v. Seaborn, 282 U. S. 101; Hopkins v. Bacon, 282 U. S. 122. As the Supreme Court stated in Hopkins v. Bacon, supra, at pp. 125 and 126, involving community income of spouses domiciled in Texas, the wife "has a proprietary vested interest in the community property such as makes her an owner of one-half of the community income. * * * The interest of a wife in community property in Texas is properly characterized as a present vested interest, equal or equivalent to that of her husband."

When Section 402 (b) (2) of the Revenue Act of 1942 is examined against the background of the foregoing summary of the Texas law, it becomes apparent that the statute in controversy violates the due process clause of the Fifth Amendment. That Section provides that all community property (the survivor's half as well as the decedent's half) shall be included in the decedent's estate, with two exceptions:

(a) Community property derived originally from compensation for personal services of the surviving spouse; and

(b) Community property derived originally from separate property of the survivor.

Community property acquired during marriage may be derived from a variety of sources not within either of the above exceptions. For example, property acquired with borrowed money, as in this case; property acquired with commingled funds; property acquired from gainful occupations, where neither spouse received compensation for personal services actually rendered, and where one of the spouses is engaged in his or her own independent
24 business, or where both are so engaged, such as farming, merchandising, ranching, manufacturing, or any other independent business; property acquired from earnings of minor children; property acquired as damages for tort; property acquired through speculation; property acquired by adverse possession; property acquired from other sources than salaries or wages.

It is stipulated in this case that the ranch, which was the principal source of the community accumulation, was acquired largely on credit. It is further stipulated that neither party derived compensation for personal services. It is likewise clear from the stipulation and agreed facts that, except to a negligible extent, none of the community resulted from the separate property of either spouse. It follows, therefore, from the agreed facts that the community property in question would not fall within either exception of the statute, and it is therefore that type of community property that is taxed under the statute to the full extent as a part of the estate of the spouse who died first.

This statute clearly violates due process, first, because it taxes this decedent's estate with his wife's property. The Supreme Court has repeatedly held that a tax on A measured by B's property is void because violative of due process. Hoeper v. Wisconsin, 284 U. S. 206; Knowlton v. Moore, 178 U. S. 41; Heiner v. Donnan, 285 U. S. 312; Frew v. Bowers, 12 Fed. (2d) 625; Hartman v. Greenhow, 102 U. S. 672; Nichols v. Coolidge, 274 U. S. 531; Coolidge v. Long, 282 U. S. 582; Schlesinger v. Wisconsin, 270 U. S. 230. See also Succession of Weiner, 203 La. 649, 14 So. (2d) 475, where it is said:

"And yet, we are asked to place an interpretation on Act No. 119 of 1932, and Section 402 (b) (2) of the Revenue Act of 1942 that would result in the inclusion in the estate of the managing partner of an interest in the community partnership to which he never had any claim and which was, in fact, during his lifetime and is now, owned by his wife."

Again, this statute is more arbitrary and capricious in other respects. It is not only taxes or attempts to tax the decedent for property which he did not own, but it also taxes property which he never owned and which he could not and did not transfer at his death. And the surviving wife is again taxed on her half of the property when she dies, with the result that the identical property is taxed to each of the two spouses, once to the spouse who owned, and once to the spouse who did not. This is double taxation. Moreover, each is reciprocally taxed on the other's property. Such results in not only 'taxation but spoilation'. Had Mrs. Herbst predeceased her husband, the statute would have required the inclusion of all of the community property here involved in her estate. The sheer accident of his prior death, and not any title or interest of Mr. Herbst in his wife's portion of the community property, has resulted in the present effort to tax the same as a part of his estate. However, had the wife predeceased the husband, she would have been deemed the owner and been taxed on the full amount thereof. Such a statute is clearly arbitrary and capricious and confiscatory and violates due process.

Moreover, the statute requires an investigation of all transactions over a long married life in order to determine whether each item of property on hand at the time of death was derived originally from the separate property or the earnings of the survivor.

If the exception of "compensation for personal services" as used in Section 402 (b) is to be given its ordinary meaning, that is, receipts for personal services rendered to someone else, or "earned income" (McLarry v. Commissioner, 30 Fed. (2d) 789; Graham v. Commissioner, 95 Fed. (2d) 174), then, under the facts in this case, there is no problem in tracing the origin of the community

property here involved, for it is stipulated that neither spouse at any time during marriage received salaries, fees or similar compensation; but if, as the Government's counsel suggests, the term is to be broadened to include the gain from any business activity embracing personal efforts, then there would be in this case a problem of tracing which could not be solved. The parties here were married for 40 years. It would be a physical impossibility for the executors in this case, or any case such as this, after the death of the one most familiar with the business transactions, to trace every item of property on hand at death back through various mutations and changes for 40 years, to determine its origin. Never before have spouses found it necessary to maintain detailed records of their respective contributions to their joint estate. And even if records had been kept, they would not have enabled the executors to meet the burden imposed upon them by this law. It is a matter of common knowledge, and this Court judicially knows, that husbands and wives situated as were the decedent and his wife, contribute personal services to the building up of the community estate. Their respective services, no matter how detailed their records may be, are impossible separately to evaluate. Thus the statute imposes burdens of proof impossible of being met.

Moreover, under this law, the property in this case is presumed to be owned entirely by the husband merely because he died first. At the same time, had the wife died first, the statute would have presumed the same property to be owned entirely by the wife. The statute thus creates arbitrary and capricious presumptions contrary to law, to fact, and to human and economic experience. There is no reasonable connection between the fact proved and the fact presumed. These arbitrary presumptions and these impossible burdens of proof clearly violate the Fifth Amendment. Mobile J. & K. C. R. Co. vs. Turnipseed, 219 U. S. 35; McFarland v. American Sugar Refining Co. 241 U. S. 79; Tot v. U. S. 87 L. Ed. 1519; Manley v. Georgia, 279 U. S. 1; Bailey v. Alabama, 219 U. S. 219; Heiner v. Donnan, supra; Schlesinger v. Wisconsin, supra.

Furthermore, the statute, in the Court's opinion, violates due process in that it ascribes significance to the origin of wealth, and thus in effect taxes decedent at death with respect to transactions occurring many years previously, innocent in nature, and not testamentary in character. The statute looks to the acquisition of the community property, and attempts to make the tax fall, in the language of the Committee Report, on the one to whom the property is "economically attributable." It is therefore a retroactive statute, taxing past transactions unrelated to

death, and is therefore more capricious and pernicious than other retroactive statutes condemned by the Supreme Court. Untermeyer v. Anderson, 276 U. S. 440; Nichols v. Coolidge, supra; Coolidge v. Long, supra. See also In Re Pell, 171 N. Y. 48, 63 N. E. 789; In Re Clark's Estate, 74 Pac. (2d) 401.

Under the foregoing cases, property rights previously vested in another may not be included in the decedent's estate for estate tax purposes, even though the property rights involved had been created by the decedent in the lifetime, donatively and under circumstances where he retained some interest in the property. A fortiori, Congress may not in this case include by a retroactive statute the interest of the wife in community property, where such interest was fully vested many years prior to her husband's death, and where her rights were not donatively created by the husband, but arose by operation of law as an incident of the marriage, many years prior to the first estate tax law, and where the husband never had any beneficial interest therein.

It is argued that at the husband's death there is a shift of property interests in that at his death the wife would have the management. Death of the husband did of course terminate his managerial control over the community property. However, his death would not result in an enlargement of the wife's property rights. Her interest in the property, that is the full beneficial interest, was in her prior to his death, and his death was not the origin of these rights. Cessation of managerial power over the property is not and cannot be made the occasion for the tax. Neither the Committee Reports nor the statute itself in terms or in operative effect, purport to tax the cessation of managerial control. Nor can the mere cessation of managerial control be made the occasion for an estate tax. Reinecke v. Northern Trust Co. 278 U. S. 339. It would be as improper to tax the husband at his death on his wife's property merely because managerial power ceases with his death, as it would be to tax a managing partner of a commercial partnership at death on the value of his partner's interest in his firm, or to tax a trustee at death on his beneficiary's property. See Poe v. Seaborn, supra. Moreover, control of community property is divided, to some extent, between the spouses. Arnold v. Leonard, supra.

The Court is of the opinion, therefore, that the statute in question violates the due process law clause of the Fifth Amendment, and that it is therefore unconstitutional and void.

26 The Court is also of the opinion that the statute violates the requirement of Article 1, Section 8, Clause 1, of the Constitution, providing that all excise taxes be uniform throughout the United States. "Uniformity" here means geographic not intrinsic uniformity. The requirement is that the same plan and

the same method be used throughout the United States, and the same subject be taxed throughout the United States at the same rate. Knowlton v. Moore, supra. The rule of liability must be the same in every state. Florida v. Mellon, 273 U. S. 12. The same method and plan is not by virtue of the amendment in question employed everywhere throughout the United States. Nor is the same subject taxed everywhere. The rule of liability varies from state to state.

The estate tax law is an excise on the privilege of passing property at death, with a few immaterial exceptions dealing with inter vivos transfers testamentary in character, which exceptions are themselves all geographically uniform. The estate tax is laid on transfers at death of property owned by the decedent. This is the rule of Sections 810 and 811 Int. Rev. Code. Knowlton v. Moore, supra. This is the rule applicable to all states, common law and community property alike. However, in the community property states an additional rule of liability is established, not recognized in the common law states. The 1942 Amendment, made specifically applicable to community property states alone, adds to a decedent's estate property not owned by decedent and not transferred at death. All property acquired my either spouse during marriage (except by gift, devise or inheritance), that is, all community property, is taxed by this statute to the first spouse to die, unless the executors show each item to have been derived originally from the personal earnings or the separate property of the survivor. It is only in the community property states that this rule is established. It is only in the community property states that property not owned and not transferred is taxed, and property acquired by either spouse during marriage is taxed in its entirety to the first spouse to die upon failure of the impossible burdens of proof hereinabove referred to. It is only in the community property states that significance is given to acquisition of property during marriage, and the questions of ownership at death and transfer at death are ignored. Thus, the same rule, the same methods and the same plans are not used everywhere throughout the United States, and the subject of taxation is not the same everywhere. It therefore follows that such Statute is discriminatory against the community property States such as Texas.

It is no answer to say that Congress may tax a subject wherever it may be found, though it not be found everywhere throughout the United States. Edye v. Robertson, 112 U. S. 580 (Head Money Cases). Community property is not a species of property such as tobacco. Community property merely refers to all property, real and personal, acquired by either spouse during marriage, except that acquired by gift, devise or descent. It is no different from other property so acquired in the common law states, except

that in certain circumstances the common law states would recognize the spouses as joint owners, and in other circumstances the one in whose name the property was taken would be regarded as the owner or as trustee for the half interest of the other spouse. (See Depas v. Mayo, 11 Mo. 314, and Solicitor's Opinion 121.) In the community property states all such property would be regarded as jointly owned, no matter in whose name the property stands.

The acquisition of property acquired during marriage by either spouse, is an event occurring in all states. It is this acquisition and not community property as such that is made the subject of tax in the community property states and not in the common law states. The statute does not purport to tax community property as such. Had it done so it would have been a direct tax, void because unapportioned. The tax is laid with respect to acquisition of property during marriage, with the exceptions noted above, but this subject, though occurring in other states, is not selected as the subject of the tax in those states.

A different rule of taxation is thus prescribed with respect to the same persons and the same property merely because of the state in which they lived at the time of death. We have thus an amazing situation. Congress continues to recognize, for estate tax purposes, the law of the common law states. The law of these common law states in turn recognizes (in common law terminology) the laws of Texas. Yet when dealing directly with Texas citizens and the same property, Congress disregards the State property laws, which in the Tyler case, supra, the United
27 States Supreme Court says it is bound to follow.

Had Congress provided that all property acquired by spouses during marriage throughout the United States, except property derived from the salaries or separate property of the survivor, be taxed to the first to die, and had Congress made this rule applicable in all states alike, disregarding state rules of ownership and transfer at death, no quarrel could be raised as to uniformity. But inasmuch as Congress has specifically made these rules applicable to certain states only, it is clear that the statute lacks uniformity.

The Court is of the opinion, therefore, that the statute violates the uniformity provision, and that for this additional reason it must be held unconstitutional.

Counsel for the Government presses upon the Court United States v. Jacobs, 306 U. S. 363, and Tyler v. U. S. 281 U. S. 497, arguing that joint tenancies and tenancies by the entirety are similar to community property estates. In joint tenancies and tenancies by the entirety, there is unity of title and interest, and by reason of the doctrine of survivorship, death enlarges the sur-

vivor's property rights. They have been held to be testamentary in character. The tax is laid upon the demise of the one that contributed the property. They were in those cases voluntary contractual situations entered into for tax avoidance. To all intents and purposes they were gifts in contemplation of death. As said by the Supreme Court of Louisiana in Succession of Wiener, supra:

"Thus it may be seen that the pivotal points upon which the decisions in these two cases turned were that the wife contributed nothing, either in money or property, toward the creation of the joint tenancy or the tenancy by the entirety, and that she was powerless to dispose of any interest in such estate by will or through legal heirship."

The opinion of the Trial Court in the case of Dimock v. Corwin, reported in 19 Fed. Supp. 56 (which was one of the two cases disposed of by the Supreme Court's opinion in the case of United States v. Jacobs, supra), states:

"The joint estate was created in 1916 as has been said. a few months prior to the adoption of the estate tax. The chances are that the purpose of Mr. and Mrs. Folger was not entirely unrelated to the possible enactment of such legislation."

This was said in support of the ruling that the whole of the joint tenancy, created before the Estate Tax was enacted, was to be included in the gross estate of the decedent instead of merely a one-half interest which might have been partitioned, severed, or sold by the decedent during his lifetime had he seen fit to defeat the wife's right to take under the doctrine of survivorship. In this connection, the Court further said:

"Had there been a severance in this case, it may be assumed that a tenancy in common would have been brought about, and the present issue would not have arisen."

The Circuit Court of Appeals in affirming the judgment of the Trial Court (99 Fed. (2d) 799), said:

"Congress has placed this tax on all joint estates because they accomplish the result of transferring the decedent's property to the surviving spouse. But Congress has excluded any portion of the property which does not represent such a transfer. * * * Congress has provided that all such transactions be included without causing an inquiry in each case, whether the particular gift was designedly made to evade the tax."

There was no opinion by the Trial Court in the companion case determined by the Supreme Court in United States v. Jacobs,

supra, but the opinion of the Circuit Court of Appeals is reported in 97 Fed. (2d) 784 (Jacobs v. United States). That Court affirmed the judgment of the Trial Court, holding that only one-half of a joint tenancy created prior to the enactment of the Federal Estate Tax was to be included in the gross estate of the decedent. The Circuit Court rested its opinion upon the distinctions between a joint tenancy and a tenancy by the entirety, pointing out that a joint tenant has a right to sell his interest and may sue for partition. The Circuit Court cited the case of Knox v. McElligott, 258 U. S. 546, and quoted from that opinion as follows:

28

"From the structure of the act to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer either title or control."

It is true that the opinion of the Circuit Court just referred to was reversed by the Supreme Court in United States v. Jacobs, supra. However, the Supreme Court found that the distinctions between a joint tenancy and a tenancy by the entirety were not sufficient to prevent the inclusion of the whole estate, saying:

"The constitutionality of an exercise of the taxing power of Congress is not to be determined by such shadowy and intricate distinctions of common law property concepts and ancient fictions. * * *

"In addition, there is sufficient substantial similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for the purposes of taxation. * * * Only a fiction stands between the two. Survivorship is the predominant and distinguishing feature of each. * * *

"While it is true that until the death of decedent here each joint tenant possessed the right to sever the joint tenancy, each was nevertheless subjected to the hazard of losing the complete estate to the other as survivor. Prior to decedent's death, his wife had no right to dispose of her interest by will, nor could it pass to her legal heirs. She might survive and thereby obtain a complete fee to the property with attendant rights of possession and disposition by will or otherwise. Until the death of her cotenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains."

The fundamental basis of the decision in the case of Tyler vs. United States, supra, is thus stated in the opinion of the Court. "* * * To include in the gross estate, for the purpose of measuring the tax, the value of property, no part of which originally belonged to one spouse, but which came to the tenancy,

mediately or immediately, as a pure gift from the other, and which, as a consequence of the latter's death was relieved from restrictions imposed by the law in respect to tenancy by the entirety so as to produce in the survivor the right of sole proprietorship, is obviously neither arbitrary nor capricious. The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end. Taft v. Bowers, 278 U. S. 470, 482."

The Statutes involved in those cases did not purport to require the inclusion in the gross estate of whichever spouse died first, as does the Statute here involved, but merely made this requirement as to the estate of the donor of the property involved just as is done in the case of ordinary gifts made in contemplation of death.

Such situations are not analogous to the case of the community property as known to the State of Texas. Community property cannot be partitioned during the marriage, and the wife
29 or husband could not sever the joint estate and thus escape the application of the Estate Tax, except by severing the marital relation. McDonald v. Stevenson, 245 S. W. 777; Kellett v. Trice, 95 Texas, 160. On the other hand, either spouse can dispose of his or her respective interest by will and in the absence thereof each spouse's share passes to the descendants, if any, instead of to the survivor. There is no right of either spouse to take the other's half under the doctrine of survivorship, but only by will, or by inheritance if there are no descendants. Moreover, the community interests of the spouses vest upon acquisition as in the case of tenants in common, and do not arise from the gift or voluntary action of either spouse, while the converse was true of the joint estates involved in the Jacobs and Tyler cases. The community relationship constitutes a partnership in which the husband is primarily the managing partner, although not always because the wife has management of a portion of the community property; and management may by legislative action be taken away or conferred upon the other spouse without running contrary to the constitutional community property rights guaranteed by the State Constitution and and its laws, and entitled to protection under the Federal Constitution.

In view of the foregoing, the Court deems it unnecessary to pass on the remaining questions raised by the plaintiff, to wit, that the statute in question is a direct tax void because unappor-

tioned and also that it invades the powers reserved to the states, in violation of the Tenth Amendment.

Judgment is accordingly rendered on this 2nd day of March, 1945, that plaintiff recover of defendant the sum of Six Thousand Nine Hundred Thirty-Seven and 76/100 Dollars ($6,937.76), together with interest thereon from date of this judgment at the rate of 4% per annum.

ALLEN B. HANNAY,
Judge Presiding.

Filed March 2, 1945.

30 In United States District Court

[Title omitted.]

Motion to amend findings of fact and conclusions of law and to correct amount of judgment

Filed March 9, 1945

The United States by its attorney, W. R. Smith, Jr., United States Attorney for the Western District of Texas, San Antonio Division, pursuant to Rule 52 (b) of the Federal Rules of Civil Procedure, moves the Court to amend its findings or conclusions by eliminating therefrom the italicized portion of the following findings of conclusions (pp. 3–4, 10–11):

"He (referring to decedent), a stock farmer, and his farmer wife, living together on a small ranch acquired after marriage largely on credit gradually acquired a comparatively substantial estate which, *as a matter of common knowledge, was attributable to the joint work of both the decedent and his wife.* * * *

* * * * *

"It is a matter of common knowledge, and this Court judicially knows, that husbands and wives situated as were the decedent and his wife, contribute personal services to the building up of the community estate. * * *"

The grounds of the motion are that:

1. There is no evidence in the record to support the finding or holding that any part of the community property here
31 involved is attributable to the work or efforts of decedent's wife.

2. The source or origin of the community property in this case cannot be found or determined in the absence of evidence relative thereto.

3. The activities of decedent's wife, relative to the community property, is not a matter of judicial notice.

4. The origin or source of the community property here involved is a matter of proof, not "a matter of common knowledge." There is no allegation in the complaint that decedent's wife worked on the ranch or that she produced any portion of the community property. The stipulation is silent with regard thereto and there is nothing in the stipulation from which it can be inferred that decedent's wife earned or by her work or efforts actually produced any of the community property. No evidence was introduced at the trial. The case was by agreement between the parties submitted on the pleadings and the stipulation. Moreover, plaintiff made no request, insofar as known to the United States, for a finding or holding that the wife produced any of the community property.

5. The statements which the United States moves be stricken have the aspect of findings of fact since they specifically pertain to the property here in question. If, however, the statements were intended as conclusions of law, they should, nevertheless, be stricken for the reason that they could only be based on the evidence in this case and have no support in the evidence.

The United States further moves, pursuant to Rule 60 of the Federal Rules of Civil Procedure, that the judgment in the principal amount of $6,937.76 be reduced by the amount of
32 $36.65 for the reason that in view of the holding of the Court that one-half of the community property should be excluded from the taxable estate deductions for executor's commissions, attorneys' fees, and administrative expenses should be correspondingly reduced. Such commissions, fees, and expenses are under Texas law borne by the entire community estate.

W. R. Smith, Jr.,
United States Attorney.

[File endorsement omitted.]

33 In United States District Court

[Title omitted.]

Order denying defendant's motion to amend findings of fact and conclusions of law, and correcting amount of judgment

Filed March 13, 1945

On this 12th day of March 1945, came on to be considered by the Court the Defendant's Motion to Amend Findings of Fact and Conclusion of Law, and to Correct amount of Judgment, which said motion was filed herein on March 9, 1945, and same is in all

things denied except as to the correction of the amount of the judgment as to which the plaintiff concurs.

It is, therefore, ordered that the principal amount of the judgment heretofore entered herein be reduced by the sum of Thirty-Six and 65/100 Dollars, making the principal amount of the judgment Six Thousand Nine Hundred and One and 11/100 Dollars ($6,901.11), and in all other respects said judgment is continued in full force and effect as of March 2, 1945.

ALLEN B. HANNAY,
Judge Presiding.

[File endorsement omitted.]

34 In United States District Court

[Title omitted.]

Petition for appeal

Filed March 30, 1945

To the District Court of the United States, Western District of Texas, San Antonio Division:

The United States does hereby appeal from the judgment made and entered in this cause on March 2, 1945, to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and petitions that this appeal be allowed, and that citation issue, as provided by law, and that a transcript of the record, proceedings, and papers upon which said judgment is based, duly authenticated, may be transmitted to the Supreme Court of the United States at Washington, D. C. A statement of jurisdiction is presented herewith.

Dated at San Antonio, Texas, this 30th day of March 1945.

W. R. SMITH, Jr.
United States Attorney,
Western District of Texas, San Antonio Division

[File endorsement omitted.]

35 In United States District Court

[Title omitted.]

Assignment of errors

Filed March 30, 1945

The United States assigns the following errors:

1. The Court erred in granting judgment for plaintiff.

2. The Court erred in failing to hold valid and constitutional the provisions of Section 811 (e) of the Internal Revenue Code, as amended by Section 402 (b) of the Revenue Act of 1942, requiring the inclusion in the taxable estate of Ernst Herbst, deceased, of the entire value of the community property held by decedent and his surviving spouse.

3. The Court erred in holding that the provisions of Section 811 (e) of the Internal Revenue Code, as amended by Section 402 (b) of the Revenue Act of 1942, violated the due process clause of the Fifth Amendment to the Constitution.

4. The Court erred in holding that Section 811 (e) of the Internal Revenue Code, as amended by Section 402 (b) of the Revenue Act of 1942, violated the uniformity requirement of Article I, Section 8 of the Constitution.

36 5. The Court erred in finding or concluding that the community property in question was acquired through the joint work of both decedent and his wife.

W. R. SMITH, JR.,
United States Attorney,
Western District of Texas, San Antonio Division.

[File endorsement omitted.]

41 In United States District Court

[Title omitted.]

Order allowing appeal

Filed March 31, 1945.

Petition and motion of the United States for appeal from the final judgment and order of this Court is hereby granted and the said appeal is hereby allowed.

It is further ordered that a certified transcript of the record, proceedings, and papers be transmitted to the Supreme Court of the United States at Washington, D. C.

Dated at Corpus Christi, Texas, this 31st day of March 1945.

ALLEN B. HANNAY,
United States District Judge.

[File endorsement omitted.]

45 In United States District Court

[Title Omitted]

Praecipe for transcript of record

Filed March 31, 1945

To the Clerk, United States District Court, Western District of Texas, San Antonio Division:

The appellant hereby requests that, in preparing the transcript of the record in the above-entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. Docket entries.
2. Complaint.
3. Answer.
4. Stipulation.
5. Opinion of this Court.
6. Judgment.
7. Motion of the United States to amend findings.
8. Order denying motion to amend findings.
9. Petition for appeal, showing the date of filing thereof.
10. Assignment of errors.
11. Order allowing appeal.
12. Jurisdictional statement.
13. Praecipe for transcript of record.

46 14. Proof of service on appellee of petition for appeal, order allowing appeal, assignment of errors, statement as to jurisdiction, and statement to appellee directing her attention to the provisions of Rule 12, paragraph 3, Revised Rules of the Supreme Court of the United States.

15. Statement to appellee directing her attention to the provisions of Rule 12, paragraph 3, Revised Rules of the Supreme Court of the United States.

Filed at San Antonio, Texas, this 31st day of March 1945.

W. R. SMITH, JR.,
United States Attorney,
Western District of Texas, San Antonio Division.

[File endorsement omitted.]

47 [Clerk's certificate to foregoing transcript omitted in printing.]

48 In United States District Court

[Title omitted.]

Stipulation for enlargement of record on appeal

Filed April 14, 1945

It is hereby stipulated and agreed by and between the attorney for the defendant-appellant and the attorney for the plaintiff-appellee in the above-entitled cause that the waiver of citation and the waiver of right to file statement in opposition to jurisdiction which have hitherto been filed and this stipulation shall be certified and transmitted to the Supreme Court of the United States as a part of the record on the appeal in this case.

Dated this 13th day of April 1945.

W. R. SMITH, JR.
Attorney for Defendant-Appellant.
HARRY C. WEEKS,
PALMER HUTCHESON,
J. P. JACKSON,
R. N. GRESHAM,
Attorneys for Plaintiff Appellee.

[File endorsement omitted.]

49 In United States District Court

[Title omitted.]

Waiver of citation

Filed April 14, 1945

The United States of America, having filed its Assignment of Errors and Petition for Appeal, and Statement of Jurisdiction, and having been allowed an appeal to the United States Supreme Court in the above-entitled cause, and plaintiff-appellee, having been served with copies of the Assignment of Errors, Petition for Appeal, Order allowing appeal, Statement of Jurisdiction, and Statement directing attention to the provisions of Paragraph 3, Rule 12 of the Revised Rules of the Supreme Court of the United States, plaintiff-appellee does, by his attorneys, hereby waive the issuance and service of a citation herein and does enter his appearance in the Supreme Court of the United States.

Dated this 13th day of April 1945.

HARRY C. WEEKS,
PALMER HUTCHESON,
J. P. JACKSON,
R. N. GRESHAM,
Attorneys for Plaintiff-Appellee.

[File endorsement omitted.]

50 In United States District Court

[Title omitted.]

Waiver of right to file statement in opposition to jurisdiction

Filed April 14, 1945

An appeal to the Supreme Court of the United States, having been allowed to the United States of America in the above-entitled cause, and the United States, having served on plaintiff and appellee a copy of the petition for appeal and order allowing appeal, together with a copy of the Assignment of Errors and Statement as to Jurisdiction and a Statement directing attention to the provisions of Paragraph 3, Rule 12 of the Revised Rules of the Supreme Court of the United States, plaintiff and appellee, by his attorneys, does hereby waive the right to file a Statement opposing jurisdiction.

Dated this 13th day of April 1945.

HARRY C. WEEKS,
PALMER HUTCHESON,
J. P. JACKSON,
R. N. GRESHAM,
Attorneys for Plaintiff-Appellee.

[File endorsement omitted.]

51 [Clerk's certificate to foregoing papers omitted in printing.]

52 In the Supreme Court of the United States

Statement of points relied upon, and designation of entire record for printing

Filed April 20, 1945

Pursuant to Rule 13, paragraph 9, of the Revised Rules of this Court, appellant states that it intends to rely upon all of the points in its assignment of errors.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for consideration of the points relied upon.

CHARLES FAHY,
Solicitor General.

Service acknowledged this 16th day of April 1945, and appellee hereby consents to the designation of record made above by appellant.

HARRY C. WEEKS,
PALMER HUTCHESON,
J. P. JACKSON,
R. N. GRESHAM,
Attorneys for Appellee.

[File endorsement omitted.]

53 Supreme Court of the United States

Order noting probable jurisdiction

May 7, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsement on cover:] Enter the Attorney General. File No. 49612. Western Texas, D. C. U. S. Term No. 1159. The United States of America, Appellant vs. Henry Rompel, Jr., Administrator de bonis non cum testamento annexo of Enrst Herbst, Deceased. Filed April 13, 1945. Term No. 1159 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1945